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# Supreme Court of the United States

**October Term, 1961**

No. [redacted] 75

MADELINE C. SCHROEDER,
*Appellant,*

*against*

THE CITY OF NEW YORK,
*Appellee.*

## JURISDICTIONAL STATEMENT.

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THE REPORTER COMPANY, INC., Walton, N. Y.—UN 5-4131—1962

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# Supreme Court of the United States

OCTOBER TERM, 1961.

No. ———

MADELINE C. SCHROEDER,

*Appellant,*

*against*

THE CITY OF NEW YORK,

*Appellee.*

## JURISDICTIONAL STATEMENT.

### (a) Opinions Below.

The opinion of the court of original jurisdiction, Supreme Court, Special Term, Albany County, dated April 22, 1960, was not reported. A copy of said opinion is hereto annexed as Exhibit "A." The Appellate Division of the Supreme Court, Third Department, wrote an opinion for affirmance dated August 1, 1961. Said opinion was reported at 14 A. D. 2d 183, 217 N. Y. S. 2d 975, under the name of *Madeline C. Schroeder v. The City of New York*. A copy is hereto annexed as Exhibit "B." In the Court of Appeals there was a majority opinion and a minority opinion, the same having been handed down January 25, 1962, but not yet reported. A copy of said opinions of the Court of Appeals is annexed hereto as Exhibit "C."

**(b) Grounds of Jurisdiction.**

(i) This action was instituted by appellant for an injunction to enjoin the appellee from diverting the waters of the Neversink River. The appellee had been authorized to divert the said river by an order of the New York Supreme Court obtained pursuant to Title K41 of the Administrative Code of the City of New York. Appellant contended in the complaint that the notice provisions contained in Section 8.0 of said statute failed to meet the Federal and State constitutional requirements of due process of law. A copy of the statute in question is annexed hereto as Exhibit "D."

(ii) The final order of the Court of Appeals was made on January 25, 1962, and entered in the office of the Clerk of Sullivan County on February 9, 1962, Exhibit "E." No application was made for rehearing. The judgment of affirmance, Exhibit "F," and the order thereon, Exhibit "G," were dated February 9, 1962, and entered on said day. The notice of appeal was filed February 13, 1962, with the Sullivan County Clerk, with whom all papers in this action have been filed, and duly served.

(iii) The jurisdiction of this Court is invoked under 28 U. S. Code §1257 (2).

(iv) Cases believed to sustain the jurisdiction are: *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112; *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306; *City of New York v. New York, N. H. & H. Ry. Co.*, 344 U. S. 293; *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948; *Grannis v. Ordean*, 234 U. S. 385; *Milliken v. Meyer*, 311 U. S. 457; *Priest v. Board of Trustees of Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398; *Wuchter v. Pizzuti*, 276 U. S. 13.

(v) The statute involved is 8.0 of Title K41 of the Administrative Code of the City of New York, also referred to as Chapter 724, § of the Laws of 1905, as last amended by Chapter 357, § 4, of the Laws of 1939 of the State of New York.

## (c) Questions Presented.

1. Is Title K41-8.0 of the Administrative Code of the City of New York unconstitutional on its face and as applied in this case in that it provides in a condemnation proceeding for notice which is entirely constructive and fails to provide even minimum standards for such notice, thereby taking from the appellant in this case her real property without due process of law in violation of the Fourteenth Amendment of the United States Constitution?

## (d) Statement of the Case.

(Numerals in parentheses refer to pages of the record in the N. Y. Court of Appeals.)

Appellant is the owner of a parcel of land on and riparian to the Neversink River and brought this action for an injunction to restrain the City of New York from diverting the river.

Appellant is one of a great number of property owners along the Neversink River who failed to file their claims for compensation within the three year limitation of time simply because during the said period she had no notice of any kind of the acquisition by appellee of an interest in her property.

The notice given by appellee, in compliance with the letter of the statute, consisted of: Publication once a

week for six weeks in the city record and two newspapers published in New York City, and two newspapers published in Orange County where this property is located, the newspapers having been obviously deliberately selected to be those published many miles from the property affected, despite the availability of newspapers published in the vicinity of the properties; the posting of 22 notices, 19 on trees and 3 on poles, on both sides of the Neversink River along a 7 or 8 mile stretch thereof (the above total figure for *both* sides of the river); the notice making no mention of any of the names of the persons affected, although each was known to appellee; the notice merely announcing the appellee's intention to apply on the return date for an order acquiring the right to divert and the appointment of Commissioners; the notice containing no indication that action was required of any property owner; and the notice, dated January 10, 1952, having been published in January, calling for a March 14, 1952, return date, despite the fact that the great majority of the properties were summer-occupied only (R. 30-32).

As appellant had no notice or knowledge of this proceeding, she did not appear.

On said date of March 14, 1952, an order was made granting the application and appointing Commissioners of Appraisal who filed their oaths of office on June 9, 1952, said latter date becoming the date of the vesting of title (R. 12, Title K41-11.0).

Under Sec. 18.0 (a) of Title K41, unless property owners file claims for compensation within three years of said taking date, their claims are "forever barred" and they receive no compensation whatever.

During the period of the application, and until about June 1, 1953, nothing occurred in the river itself. On the latter date, the river was diverted. Appellant, prior to her retention of counsel in 1959, had no notice, actual

nor implied, of the taking of her property. She had not been served with any summons, nor had she (or any other property owners) been personally notified even by letter, nor in any other way, of this proceeding.

Instead of filing a claim, which would have been late, she immediately commenced this action for an injunction, based upon the inadequacy of the notice provisions of the statute in question.

The federal question, being the gravamen, or the essence, of the suit, is raised in the initial pleading, the complaint, and has been the sole issue in this case. Paragraph 30 of the complaint states: "That consequently the notice provisions of the said Condemnation Statute failed to meet the Federal and the State constitutional requirements concerning the taking of private property by due process of law" (R. 17).

The complaint also alleged the irreparable damage to appellant's property (R. 17).

After answer, and reply, the appellee moved at Special Term for judgment on the pleadings to dismiss the complaint under Rule 112 of the Rules of Civil Practice and Section 476 of the Civil Practice Act, thereby, for the purposes of the motion, admitting the factual allegations of the complaint. The appellant cross-moved for the dismissal of the answer, under the same Rule and Section, the answer not having raised any factual issue nor having alleged any notice additional to that set forth above.

**(e) The Federal Question Raised is Substantial.**

This is a "test case," the outcome of which will determine at least two hundred claims pending and awaiting the result hereof.

Pleaded in the complaint, and admitted by the answer, are the following figures showing the number of claims filed too late (R. 15-16).

| Section No. | No. of Mapped Parcels | No. of Mapped Parcels Not Filing in Time |
|---|---|---|
| 1 | 85 | 13 |
| 2 | 83 | 23 |
| 3 | 76 | 43 |
| 4 | 96 | 78 |
| 5 | 82 | 67 |
| | 431 (should be 422) | 224 |

Additionally, the complaint alleges, and the answer admits, that there are a substantial number of properties upland from the river with deed rights-of-way thereto, which properties were not mapped by appellee, the City treating same as if they did not even exist, a large number of which failed to file their claims in time (R. 16-17).

This Schroeder property was mapped by appellee and designated on the Section No. 4 Map as parcel #424, in which section over 81% of the properties were acquired by appellee without compensation to the property owners!

In addition to the many cases now pending, this statute in question is still being used by appellee. For example, the Cannonsville Reservoir and Dam, which will impound and divert the west branch of the Delaware River, is presently under construction, the statute in question providing appellee with the opportunity to acquire many more properties without compensation by simply hiding the notices. As Judge Dye said in his dissent; "If constructive notice were to be authorized, it could have been provided in some form which was not *calculated to go unobserved* by the persons to be affected." (Italics added.)

This Court established an eminently just principal of law in the case of *Mullane v. Central Hanover Trust Co.*, 339 U. S. 306, holding that where the names and post office addresses of persons affected by a proceeding are at hand, that reasons disappear for resort to means less likely than the mails to apprise them of its pendency. This principal was re-affirmed by this Court in the case of *City of New York v. New York, N. H. & H. Rr. Co.*, 344 U. S. 293, in *Walker v. City of Hutchinson, Kansas*, 352 U. S. 112, and in *Wisconsin Electric Power Co. v. Milwaukee*, 352 U. S. 948. In the case at bar, the names of the owners of mapped parcels, such as Mrs. Schroeder, were listed on the maps prepared by appellee, the river frontage of each property was shown on the maps to a tenth of a foot, and the mailing of notices would have been indeed a simple matter.

The majority of the New York Court of Appeals relied upon the posting of handbills and the supposed visible effect of the diversion before the expiration of the three-year statute of limitations as taking this case out of the scope of the above cited cases.

The minority of said court held that the publication of notices in distant newspapers with no circulation in the area of the properties despite the availability of newspapers in nearby communities, together with the posting of handbills in remote places at a time when it was known that the properties would be vacant, failed to provide any reasonable notice, and that the statute in question was inherently defective in making no provision for personal service, or any adequate substitute even though personal service could have easily been made.

A question therefore presented on this appeal is whether only notice by publication is defective where the names and addresses of the persons affected are known to the condemning authority, or whether, a statute provid-

ing for publication of notices omitting the names of the persons affected, omitting reference to action that is required to be taken by property owners, and omitting any requirement for the selection of newspapers in the area of the properties affected, coupled with a general requirement for such notices to be posted in the general vicinity of the properties (in this case 22 along 7 or 8 miles of river—14 to 16 miles of river banks), in the forests on trees and poles, in January when the properties are generally vacant, with a return date six weeks thereafter; although the names and addresses of each property owner is known to the condemning authority, complies with due process.

The question is also whether the posting of 22 notices as aforesaid to apprise 96 owners of mapped parcels, and a great many owners of unmapped properties likewise affected (in Section 4 at least another 100) should, as a matter of law and as a practical matter of fair play, take this case out of the scope of the eminently fair rule laid down in *Mullane* and the other cases cited above.

With respect to the reliance by the majority of the New York Court of Appeals upon the supposed visible effects of the diversion, we point out, firstly, that the diversion did not take place until one year and three months *after* the return date of the application. This was not an *ex parte* application, and entitled property owners affected to appear and object and raise any other question with respect to the application. In fact, this was done by certain property owners in Section No. 1, near the dam itself, who obtained from the appellee concessions incorporated into the court order appointing commissioners requiring the appellee to make certain minimum releases.

Secondly, the New York Court, in relying upon the supposed visible effects of the diversion, completely overlooked the case of *Wuchter v. Pizzuti*, 276 U. S. 13 (1928). By

considering the imagined "visible effect" of the diversion as providing some type of actual notice, to overcome the infirmity of the statute, the learned Court below decided, contrary to the said *Wuchter* case, that this supposed notice supplied constitutional validity to the defective statute. Not only did this supposed notice occur more than a year after the return date of the application at which time property owners could have raised objections, but it also occurred only two years prior to the expiration of the statute of limitations for the filing of claims for compensation, there being a three-year statute of limitations.

Thirdly, if this statute is upheld on these grounds, we can see the consequence of the diversion occurrring *after* the expiration of even the three-year period for the filing of claims. This is not far-fetched nor speculative. To buttress the existence of this possibility, we point out that in the case of appellee's diversion of the Rondout, it acquired the right to divert on May 6, 1941, and the date of the actual diversion was April 3, 1944, just one month short of the expiration of the statute of limitations to file claims.

Fourthly, the supposition by the learned Court below of this "visible effect" has no basis in this record. It is not even alleged in the answer. It was merely argued by appellee in its brief, and vigorously denied by appellant in her brief, and is not a part of this record. Considering the fact that this case is before the Court on a motion and cross-motion on the pleadings, with nothing in this record other than the pleadings, the Court below took judicial notice of an alleged fact vehemently denied by appellant, thereby depriving her of her right to a trial as to this question of fact, if it is at all relevant in the first place.

Appellant's property is approximately twenty-five miles downstream from the Neversink Dam (R. 12). The percentage of diversion at her property is approximately 50%. However, the effect of the diversion is not apparent to a

layman as the height of the stream is not necessarily lowered. The temperature of the water, however, and the velocity of flow, is greatly changed with the result of a complete destruction of bathing, swimming and fishing facilities in the river. It is difficult in the space allotted in this statement to give this point the extensive and scientific explanation required, but appellant shall brief the same fully should this Court accept jurisdiction.

In conclusion, we point out that the conduct of the appellee in appropriating real property under the statute in question by providing notice in compliance with the letter of the statute in question, but calculated to go unobserved, forbodes even greater abuses in future condemnations should the statute be upheld, in addition to that illustrated here. It is therefore respectfully submitted that the Federal question is indeed substantial.

Respectfully submitted,

LOUIS B. SCHEINMAN,
Counsel for Appellant.

# APPENDIX.

## Exhibit A.

STATE OF NEW YORK, SUPREME COURT.

SULLIVAN COUNTY.

---

MADELINE C. SCHROEDER,

*Plaintiff,*

*against*

THE CITY OF NEW YORK,

*Defendant.*

---

(Supreme Court, Albany County, Special Term, April, 22, 1960.)

(Justice Donald S. Taylor, Presiding.)

Appearances:

Krieger & Scheinman, Esqs., Attorneys for plaintiff, Louis B. Scheinman, Esq., of Counsel.

Charles H. Tenney, Esq., Corporation Counsel, Attorney for defendant, Theodore R. Lee and William A. Kaercher, Esqs. of Counsel.

*Memorandum.*

TAYLOR, J.:

This is an action instituted by a riparian owner whose premises extend about 175 feet to and along the center of the Neversink River permanently to enjoin the defendant from diverting its waters upstream from plaintiff's prop-

erty for the purposes specified in Title K 41 of the Administrative Code of the City of New York.

The defendant moves for judgment on the pleadings. (Civ. Prac. Act, §476; Rules of Civ. Prac., Rule 112.) The plaintiff cross-moves for similar relief and also to strike three defenses consisting of new matter on the ground that they are insufficient in law. (Rule 109, subd. 6, *supra.*)

The parties are agreed that the sole issue to be determined on the respective motions for judgment is whether the notice provisions of Section K 41-8.0 of the Water Supply Act—admittedly fully complied with by the defendant—upon which the diversional rights which the defendant exercises are to some extent founded are violative of the due process provisions of the Federal and State Constitutions (N. Y. Const., Art. I, §6; U. S. Const., Amendts. 5 and 14, §1).

Mr. Justice Mac Affer thoroughly considered, and, in my judgment, correctly determined the constitutional questions which are presented here. (*Matter of Huie* [*Bruckman*], Sup. Ct., Sullivan Co., Feb. 17, 1956; see, also, *Matter of Huie* [*Riehle*], Sup. Ct., Orange Co., June 17, 1959, Eager, J.; *Matter of Huie* [*Neilson*], 6 A. D. 2d 837.)

Accordingly, the motion is granted and the cross-motion is denied.

Submit order.

**Exhibit B.**

2678

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

---

MADELINE C. SCHROEDER,

*Plaintiff-Appellant,*

*vs.*

THE CITY OF NEW YORK,

*Defendant-Respondent.*

---

Argued, March Term, 1961.
Decided, August 1, 1961.

Before:

Hon. Francis Bergan,
Presiding Justice,
Hon. James Gibson,
Hon. J. Clarence Herlihy,
Hon. Walter B. Reynolds,
Associate Justices.

Appeal from order and judgment entered thereon granting respondent's motion for judgment on the pleadings and denying appellant's cross-motion to dismiss the answer.

Krieger & Scheinman, Attorneys for Plaintiff-Appellant, Woodbourne, N. Y.

Charles H. Tenney, Corporation Counsel, City of New York, Attorney for Defendant-Respondent, 41 John Street, Kingston, N. Y.

*Exhibit B*

*Opinion for Affirmance.*

REYNOLDS, J.:

Appellant, riparian owner of a parcel of land on the Neversink River in Orange County, brought suit to enjoin respondent from diverting said river upstream from appellant's property. Respondent in 1952 commenced a proceeding to acquire the right to divert the river. In accordance with the provisions of §K 41-8.0 of the Administrative Code of the City of New York, notice of the proposed diversion, properly listing the property affected was published each week for six weeks prior to the presentation of the petition in the city record, two public newspapers published in the City of New York and two public newspapers published in the county in which the appellant's property was situated. In addition handbills were posted in at least 20 conspicuous places in the vicinity of the real estate affected. There is no requirement for written notice and none was sent. The statute bars claims not filed within 3 years from the filing of the oaths of the Commissioners of Appraisal (June 9, 1952) or within 3 years of the diversion (June 2, 1953). Appellant does not dispute that there has been compliance with the provisions of the Administrative Code but asserts that the notice requirements of §K41.8.0 are violative of Article 1, §6 of the New York Constitution and Amendments 5 and 14 §1 of the United States Constitution claiming that constructive notice is constitutionally inadequate. Constructive notice has long been upheld by the courts of this State in proceedings similar to the instant case (*Rexford v. Knight*, 11 N. Y. 308; *Benedict v. State of New York*, 120 N. Y. 228 [1890]; *Matter of City of Rochester* [*In Re McLean*], 102 App. Div. 181 [4th Dept.]).

*Exhibit B*

In the *City of Rochester* case at pp. 186-187:

> "As we have seen, personal notice was not served upon the owners of the premises, and we think such service was not necessary. The Legislature was competent to declare what notice would be sufficient. It has been held that a notice is sufficient if of a kind which it is reasonably probable would apprise the party proceeded against of the proceeding, and such as will give such party an opportunity to be heard (*Matter of Union El. R. R. Co. in Brooklyn*, 112 N. Y. 61; *Matter of Mayor, etc., of City of New York*, 99 *id.* 570).
>
> "We think that under those authorities the notice prescribed by the act in question complied with the requirements of the Constitution."

Appellant urges that the Supreme Court opinion in *Walker v. Hutchinson*, 352 U. S. 112, decided in 1956, is determinative of the issues here presented. However, the pertinent provisions of the Kansas statute in *Walker* are a far cry from those publication requirements in K 41-8,0. The Kansas statute also provided for an alternate notice in writing which is absent in the New York statute involved herein. Under K 41-18,0 appellant had 3 years from the filing of the oaths of the commissioners or from the diversion, whichever was later, in which to file her claim. In our opinion the publications, posting and the patently visible effect of the diversion proceedings on the Neversink over a 3 year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions. We do not feel compelled to declare unconstitutional a statute which was enacted in 1905 and which has been consistently upheld by the courts (Cf. *Matter of Huie* [*Neilson*], 6 A. D. 2d 837; *Matter of Huie* [*Rollins*], 204 Misc. 945; *Matter of Huie* [*Bruckman*], Supreme Court, Rensselaer County [MacAffer, J.] February 17, 1956).

The order and judgment should be affirmed.

## Exhibit C.

STATE OF NEW YORK,

COURT OF APPEALS.

---

MADELINE C. SCHROEDER,

*Appellant,*

*vs.*

THE CITY OF NEW YORK,

*Respondent.*

---

*Opinion.*

FULD, J.:

On this appeal, before us as of right on constitutional grounds, we are called upon to decide whether the notice provisions of the Water Supply Act (Administrative Code of the City of New York, tit. K, ch. 41) contravene requirements of the Due Process Clause of the Federal Constitution (5th and 14th Amdts.; see, also, N. Y. Const., art. I, §6).

The City of New York, the defendant herein, early in 1952 instituted a proceeding, pursuant to the Water Supply Act, to acquire the right to divert a portion of the Neversink River in Orange County; in June, the City became vested with such a right, and about a year later, in June of 1953, work on the actual diversion commenced. Seven years thereafter, the plaintiff, a riparian owner of a parcel of land on the Neversink, brought this action to enjoin the City from diverting the river upstream from her property. It was her position, as reflected in her complaint, that it was not until 1959 that she learned that the City "had acquired any portion of her property" and that she had a right to file a claim; that the diversion damaged her property and, if the diversion contin-

ued, would occasion further damage; that she had no notice of the City's proceeding; that the notice provisions of the Water Supply Act are constitutionally inadequate; and that, consequently, the City acquired no right to divert water from the river and should be restrained from so doing.

The City, after serving an answer, moved for judgment on the pleadings (Rules Civ. Prac., rule 112), on the ground (among others) that the plaintiff's action was barred by her failure to file a claim, as required by the Water Supply Act (Administrative Code, §K41-18.0), within three years from the time title vested in the City or within three years from the time of the actual diversion, whichever happened to be later. The court at Special Term, deciding the motion in favor of the City, dismissed the complaint and the Appellate Division unanimously affirmed the resulting judgment. As already indicated, the plaintiff appeals to this court as of right.

Due process does not, of course, require or insist upon personal service in every type of case. Constitutional demands are satisfied if the notice provided for (and given) is "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" (*Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 314; see, also, *Walker v. Hutchinson City*, 352 U. S. 112, 115). And, in determining whether the statutory notice provided for is just and reasonable, "reference" must necessarily be had "to the subject with which the statute deals" (*American Land Co. v. Zeiss*, 219 U. S. 47, 67).

With controlling principles in mind, we believe that the notice provided for by the Water Supply Act satisfies the demands of due process of law. Not only does that statute, which was enacted in 1905, call for frequent publication in "public newspapers"—once a week for six weeks in two newspapers published in New York City and in two papers published in each county in which the real estate affected is located—but it also provides for the

posting of handbills, likewise for a period of six weeks, "in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate to be * * * taken or affected" (§K41-8.0).

These requirements were fully complied with—notice of the proposed diversion of the Neversink River was published in appropriate newspapers and, as noted by the Appellate Division, "handbills were posted in at least twenty conspicuous places in the vicinity of the real estate affected."[1] Moreover, since we deal with real property (cf. *Mullane v. Central Hanover Tr. Co.*, 339 U. S. 306, 316, *supra*), it is of considerable significance that the effect of the challenged diversion was clearly apparent long before the expiration of the three-year period within which the plaintiff was required to file her claim. In sum, as Judge Reynolds, speaking for a unanimous Appellate Division, observed, "the publications, postings and the patently visible effect of the diversion proceedings on the Neversink over a 3-year period would constitute sufficient notice to meet * * * [constitutional] requirements."[2]

In the light of what we have written, it is hardly necessary to say that the present case, concerned as it is with notice respecting the tangible and the visible, is quite unlike the *Mullane* case (339 U. S. 306, *supra*).

The judgment appealed from should be affirmed, with costs.

---

[1] As to the plaint that the handbills were posted in the month of January and might not be readable in July when a summer resident such as the plaintiff returned to the area, we need but note that these handbills were printed with permanent ink on durable cloth, about 28 inches long and 18 inches wide, and were firmly affixed to the places to which they were attached and that they undoubtedly remain legible for years. And, with respect to the notice in the newspapers, we would but add that no newspaper is published in the particular community in which the plaintiff's property is situated.

[2] The fact that a considerable number of property owners failed to present damage claims within the time specified by the statute is beside the point. What the situation may have been in these cases, we are not told and we do not know. It may well be that the omission to file indicated, not that the owners were unaware of the diversion, but that they did not believe that their properties were sufficiently affected to justify the presentation of claims.

*Exhibit C*

DYE, J. (dissenting):

The basic issue on this appeal is whether technical compliance with the notice provisions of the New York City Water Supply Act is constitutionally adequate to satisfy the requirements of due process for the taking of property or an interest therein. We think not and feel obliged to express our dissent from the decision about to be rendered.

The appellant is the owner in fee of premises designated on the appropriation map for the Delaware Project as Parcel No. 424 Neversink Riparian No. 4 in Deer Park, Orange County, which is about twenty-five miles downstream from the site of the Neversink Dam and Reservoir in Sullivan County. It is alleged that as a result of such public work her property was adversely affected and seriously damaged. Her claim for compensatory damage, like that of many others, filed more than three years after the vesting has been rejected for untimeliness (K41-18.0).

The New York City Water Supply Act, Title K41, Administrative Code of the City of New York, prescribes the procedures to be followed by the Board of Water Supply in acquiring real estate, easements and rights affecting real property required for its water supply system. K41-8.0 relates to the manner in which notice shall be given for the appointment of commissioners of appraisal for the purpose authorized.

In pertinent part that section provides: "The corporation counsel shall give notice in the City Record, and in two public newspapers published in the city of New York and in two public newspapers published in each other county in which any real estate laid out on such map may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal * * * Such notice shall be so published, once in each week,

in each of such newspapers, for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate to be so taken or affected."

When the city undertook the construction of the "Delaware Project" for the use of its water supply system it, technically, complied with all prescribed procedures including the publication and posting of notice of the application for the appointment of commissioners of appraisal.

The affidavits establish that *the publication in Orange County was made in newspapers situate in the rural communities of Chester and Warwick located many miles from the subject property and with no circulation in the community where the premises were located* although at the time there were available newspapers in the nearby communities of Port Jervis and Middletown. We note too that twenty-two hand bills were posted on trees along Highway Rt. 209 and on trees along the easterly and westerly banks of the Neversink River for a distance of about one hundred feet on either side of certain bridge crossings. The posting and publication were done in the month of January and, although in compliance with the letter of the statute, such publication and posting in such remote places at a time when it was known that the subject premises would be vacant it seems to me fail to comply with its spirit and intent and as matter of fact failed to give this plaintiff and numerous others, similarly situated, any reasonable opportunity of knowing that such a proceeding was pending.

It is also significant that of the four hundred and twenty-two numbered parcels affected or taken and designated on the appropriation map, the fee owners of two hundred

and twenty-four of such parcels—something more than half—failed to file in time and these figures include only those riparian parcels and exclude those which have appurtenant easements for use of the river, as admitted by defendant's answer. Of that number, the great majority are owners of property located in a section remote from the actual dam project. We cannot believe that all of these owners, if apprised of the intended condemnation, would for their own reasons fail to act to protect their interests.

In our view, the statute relied on is inherently defective since no provision is made for personal service, or any adequate substitute. It is, of course, recognized that personal notice may not always be possible, but that affords no reason why a statute should omit reasonable requirements and depend only on publication and posting of the kind provided by this statute. This statute falls short of the constitutional principles dealt with in *Mullane v. Central Hanover Trust Company* (339 U. S. 306, reversing 299 N. Y. 697 which had affirmed 272 App. Div. 772 in which Van Voorhis, J., dissented in an opinion). The principle there enunciated should be followed here. *Mullane* was an accounting proceeding under the common trust fund as established by §100-c of the New York Banking Law. The notice provisions were challenged as contravening constitutional due process for lack of provision for adequate notice. The notice there provided was a constructive one by publication. As Justice Van Voorhis pointed out in his dissent, which reasoning was adopted with approval by Justice Jackson writing for a majority in the Supreme Court of the United States, "The fundamental requisite of due process of law is the opportunity to be heard." (*Grannis v. Ordean*, 234 U. S. 385, 394). As Justice Jackson expressed it, "This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether

to appear or default, acquiesce or contest, * * *" * * * * is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. *Milliken v. Meyer*, 311 U. S. 457; * * * *Priest v. Board of Trustees of Town of Las Vegas*, 232 U. S. 604; *Roller v. Holly*, 176 U. S. 398 * * * 176 U. S. 398 * * * the reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected."

The statute now before us does not satisfy these elemental tests since it makes no provision for the giving of personal notice of a pending application for the appointment of commissioners, but relies solely on a defective constructive form of notice. The essential thing is notice. It is only when such notice cannot be given personally that resort should be had to a substitute or alternative method such as publication and posting, and then it must be done in a manner calculated to afford actual notice. Here personal service is not required, and no personal service was made although such a requirement could have been easily met since the city knew that the plaintiff owned the subject property—it had available her address and no reason appears why such a notice could not have been given. If constructive service were to be authorized, it could have been provided in some form which was not calculated to go unobserved by the persons to be affected.

It cannot be disputed that due process "requires that an owner whose property is taken for public use must be given a hearing in determining just compensation, and the right to a hearing is meaningless without notice (*Walker v. City of Hutchinson*, 352 U. S. 112)."

Furthermore, it is apparent from the opinion written in the court below and their holding of constitutional

validity was not free from doubt because they added as an additional ground for affirmance that "In our opinion the publication, posting and *patently visible effect of the diversion proceedings on the Neversink over a three-year period would constitute sufficient notice to meet the requirements of the New York and Federal Constitutions.*" However that may be, as a comment, it affords no substitute for the fundamentals of due process, that is, a notice reasonably calculated under all the circumstances to apprise a party of the pendency of the action and afford an opportunity to be heard.

The plaintiff's complaint alleges a cause of action to restrain the diversion on constitutional grounds. The passage of time prevents the granting of that relief but does not prevent a determination of the constitutional question and thus afford this plaintiff an opportunity to have her claim filed and to be heard on the issue of damages for the appropriation. Such a result gives the plaintiff her day in court which so far has been denied—not because she defaulted or acquiesced—but because she never had notice of the pendency of the proceeding sufficiently adequate to satisfy constitutional due process for the taking of her property.

The judgment appealed from should be reversed, with costs in all courts, and plaintiff's cross-motion for judgment on the pleadings granted.

. . . . . .

Judgment affirmed, with costs. Opinion by Fuld, J. All concur except Dye, J., who dissents in an opinion in which Van Voorhis, J., concurs. Foster, J., taking no part.

## Exhibit D.

Administrative Code of the City of New York.

TITLE K41-8.0.

(New York City Charter and Administrative Code, Annotated, vol. 5, pp. 558-559, 1957 ed., William Press, Inc.)

§K41-8.0. NOTICE OF APPLICATION FOR APPOINTMENT OF COMMISSIONERS OF APPRAISAL—The corporation counsel shall give notice in the city record, and in two public newspapers published in the City of New York and in two public newspapers published in each other county in which any real estate laid out on such maps may be located, and which it is proposed to acquire in the proceeding, of his intention to make application to such court for the appointment of commissioners of appraisal which notice shall specify the time and place of such application, shall briefly state the object of the applications and shall describe the real estate sought to be taken or affected. A statement of the real estate to be acquired or affected for the purpose of carrying out the said plan or plans or in any part thereof with separate enumerations of the numbers of the parcels to be taken in fee, and of the numbers of the parcels in which an easement is to be acquired, together with the route of the tunnels and aqueducts by courses and distances and of the greatest and least width of its required easement or parcel of land with a reference to the dates and places of filing such maps, shall be sufficient description of the real estate sought to be so taken or affected. Such notice shall be so published, once in each week, in each of such newspapers for six weeks immediately previous to the presentation of such petition; and the corporation counsel shall in addition to such advertisement cause

copies of the same in hand bills to be posted up, for the same space of time in at least twenty conspicuous places on the line of the aqueduct or in the vicinity of the real estate so to be taken or affected. After the original appointment of commissioners of appraisal pursuant to the provisions of this article, the corporation counsel may apply at a Special Term of the Supreme Court in the same judicial district where application for such original commission was made for the appointment of a successor commission, upon first giving ten days' notice by advertisement in the newspapers herein above described of his intention to make such application.

**Exhibit E.**

No. 361

Court of Appeals,
State of New York, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 25th day of January, in the year of our Lord one thousand nine hundred and sixty-two, before the Judges of said Court.

Witness,

The Hon. Charles S. Desmond,
Chief Judge, Presiding

Raymond J. Cannon, Clerk

Remittitur January 25, 1962

(Seal)

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MADELINE C. SCHROEDER,

*Appellant.*

*vs.*

THE CITY OF NEW YORK,

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*Respondent.*

BE IT REMEMBERED, That on the 27th day of October in the year of our Lord one thousand nine hundred and sixty-one, Madeline C. Schroeder, the appellant—in this cause, came here unto the Court of Appeals, by Krieger & Scheinman, her attorneys, and filed in the said Court a Notice of Appeal and return thereto from the judgment

of the Appellate Division of the Supreme Court in and for the Third Judicial Department. And The City of New York, the respondent—in said cause, afterwards appeared in said Court of Appeals by Leo A. Larkin, its attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Louis B. Scheinman of counsel for the appellant—, and by Mr. Theodore R. Lee, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed, with costs.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed with costs, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

## Exhibit F.

SUPREME COURT OF THE STATE OF NEW YORK.

SULLIVAN COUNTY.

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MADELINE C. SCHROEDER,

*Plaintiff,*

*against*

THE CITY OF NEW YORK,

*Defendant.*

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MADELINE C. SCHROEDER, the above named plaintiff, having appealed to the Court of Appeals from a judgment of the Appellate Division of this Court, Third Department, entered in this action in the office of the Clerk of the County of Sullivan on the 11th day of August, 1961, affirming the judgment entered therein on the 8th day of June, 1960, in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed with costs and a remittitur from the Court of Appeals having been filed in the office of the Clerk of the County of Sullivan, and an order having been entered thereon, making the judgment of the Court of Appeals the judgment of this Court and directing the entry of a judgment of affirmance herein with costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein; and the costs of the defendant having been taxed at $338.63

*Exhibit F*

Now, on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for the defendant, it is

ADJUDGED that the judgment in this action entered on the 11th day of August, 1961, be, and the same hereby is, affirmed, and that the defendant, The City of New York, recover of the plaintiff Madeline C. Schroeder, the sum of Three Hundred Thirty-eight and 63/100 ($338.63) Dollars costs as taxed, and for execution therefor.

Judgment entered this 9th day of February, 1962.

MILLICENT C. FLYNN
Clerk

## Exhibit G.

At a Special Term of the Supreme Court held in and for the County of Sullivan at the Sullivan County Court House in the Village of Monticello, New York, on the 9th day of February, 1962.

Present:

Hon. Lawrence H. Cooke,
Justice.

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MADELINE C. SCHROEDER,

*Plaintiff,*

*against*

THE CITY OF NEW YORK,

*Defendant.*

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The above mentioned Madeline C. Schroeder, having appealed to the Court of Appeals from the judgment of the Appellate Division of this Court, Third Department, entered on the 11th day of August, 1961 in the office of the Clerk of the County of Sullivan, and the Court of Appeals having heard said appeal and ordered and adjudged that the judgment so appealed from be affirmed, with costs;

Now, upon reading and filing the remittitur of the Court of Appeals herein, dated January 25, 1962, it is on motion of Leo A. Larkin, Corporation Counsel of the City of New York and attorney for the defendant,

*Exhibit G*

ORDERED, that said judgment of the Court of Appeals be, and the same hereby is, made the judgment of this Court and that the judgment entered herein in the office of the Clerk of the County of Sullivan on August 11, 1961, be, and the same hereby is affirmed, and that a Judgment of this Court be entered herein affirming said Judgment with the costs of said appeal to be taxed against Madeline C. Schroeder, the plaintiff herein.

Enter in Sullivan County

LAWRENCE H. COOKE
Justice of the Supreme Court